

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO GARCIA,

No. C 09-02235 CW (PR)

Plaintiff,

Appeal No. 11-17209

v.

ORDER REVOKING IN
FORMA PAUPERIS STATUS
ON APPEAL

A.A. LAMARQUE and JAMES
TILTON,

Defendants.

This is a civil rights case filed pro se by a state prisoner. The Court granted Plaintiff leave to proceed in forma pauperis. After full briefing by the parties, the Court granted Defendants' motion to dismiss the complaint for failure to exhaust administrative remedies and entered a judgment of dismissal with prejudice. Plaintiff has filed a notice of appeal. The United States Court of Appeals for the Ninth Circuit has referred the case back to this Court for a determination whether Plaintiff's in forma pauperis status should be revoked.

Rule 24(a)(3) of the Federal Rules of Appellate Procedure provides that a party granted leave to proceed in forma pauperis in the district court may continue in that status on appeal unless the district court certifies that the appeal is not taken in good faith. Section 1915(a)(3) of Title 28 of the United States Code similarly provides that an appeal may not be taken in forma pauperis if the trial court certifies it is not taken in good faith. "Not taken in good faith" means "frivolous." Ellis v. United States, 356 U.S. 674, 674-75 (1958); Hooker v. American Airlines, 302 F.3d 1091, 1092 (9th Cir. 2002) (equating "not taken

1 in good faith" with "frivolous").

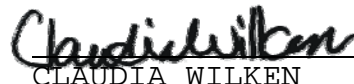
2 Here, the Court granted Defendants' motion to dismiss based on
3 undisputed evidence that Plaintiff, who claimed he drank
4 contaminated water and was exposed to H. pylori bacteria with the
5 attendant consequences, did not file an administrative appeal
6 concerning the matter until several years after his alleged
7 exposure. Consequently, his appeal was screened out as untimely.
8 The Court found that denial of the appeal as untimely was proper
9 and that Plaintiff had not shown that special circumstances existed
10 to excuse his untimely filing. Further, the Court determined that
11 dismissing the complaint without prejudice was not warranted
12 because, given the absence of extenuating circumstances,
13 Plaintiff's opportunity to exhaust expired many years ago and no
14 amendment could allow him to state a claim that would survive a
15 motion to dismiss for non-exhaustion.
16

17 Based on the foregoing, the Court concludes that Plaintiff's
18 appeal is not taken in good faith because it is frivolous.
19 Accordingly, Plaintiff's in forma pauperis status is REVOKED.
20

21 The Clerk of the Court shall serve a copy of this Order on
22 Plaintiff and on the Court of Appeals.

23 IT IS SO ORDERED.

24 DATED: 9/22/2011



CLAUDIA WILKEN
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

FRANCISCO GARCIA,

Plaintiff,

v.

A A LAMARQUE et al,

Defendant.

Case Number: CV09-02235 CW

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on September 22, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Francisco Garcia K-38818
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233

Clerk's Office
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Dated: September 22, 2011

Richard W. Wieking, Clerk
By: Nikki Riley, Deputy Clerk

United States District Court
For the Northern District of California